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Subject: Filibuster talking points

External Message

Here is a rough draft. Hope it's a good starting point, although I know it's a bit long!

1. The state legislatures and the courts, including the Supreme Court, have failed to resolve, on the merits, serious contentions, backed by substantial evidence, that in at least 4 States -- AZ, GA, PA, and WI -- illegal votes were cast & counted in numbers much more than enough to have tipped the balance in favor of Biden & Harris, so that the electoral votes sent in by the governors of those States are not legitimate.

2. The core objective of Members of Congress who believe it's wrong to count any electoral votes from these States unless and until those contentions are decided on the merits, either by the Supreme Court or by state legislatures, should be to find a way to prevent the Biden camp from concluding the vote on Jan. 6, before there is time for further scrutiny of these contentions. Even if this effort ultimately proves unsuccessful in blocking Biden's election, it would at minimum focus public attention on the serious abuses by Democrats in this election, and make clear Biden was not legitimately elected.

3. The strategy of the Biden camp to have Biden anointed President in Congress on Jan. 6, when the electoral votes are to be opened and counted, without ever having this evidence scrutinized, is predicated entirely on the Electoral Count Act of 1887, which sets draconian limits on debating objections to the electoral votes of any particular State -- 2 hours max, in each house of Congress, with no Member of Congress speaking for more than 5 minutes. The Democrats mean to use this antiquated act to suppress information regarding the illegalities.

4. One way around the Act is for the VP to take the approach of Thomas Jefferson in 1801, and take the position that as President of the Senate, it is his responsibility to count the votes and, in so doing, resolve any disputes concerning them. If he did this, he would not necessarily count the contested States in favor of him and Trump -- he might merely say that none of these States can be counted until either the Supreme Court or state legislatures act on pending objections. This would pressure the Supreme Court and state legislatures to act, particularly if he refused even to open the envelopes containing the electoral votes until there was further action on the objections (under the 12th Amendment, only the President of the Senate may open the envelopes.)

5. Another way to create delay and pressure for further action would be for the VP to allow the objection & debate process to generally go forward within the framework of the Electoral Count Act, but for Senators objecting to particular states to engage in filibusters to prevent a final vote on the states unless and until there was further action by the Supreme Court or state legislatures.

6. Under the Act, the electoral votes of the states are to be opened in alphabetical order. So the VP opens the envelopes for Arizona, notes that there are two competing slates of electoral votes, and hears objections from a House and Senate member to each, and then the houses break to debate.

7. In the House, the debate proceeds under the Electoral Count Act, for 2 hours, with no Representative speaking for more than 5 minutes.

8. But in the Senate, the VP, presiding over the Senate proceedings, recognizes Sen. Hawley or some other Senator who objects, who then proceeds to speak much longer than 5 minutes. When an objection is raised, the VP rules it out of order, given that Senate rules allow for unlimited debate on a question, subject only to a cloture vote. So only a vote by 60 Senators, including about a dozen Republicans, could bring a debate over Arizona to an end; and it might be politically painful for a Republican to vote to cut off debate and thereby appear complicit in preventing evidence about election abuses from coming to public light. This could be repeated with all the other States in question. It could take hours of debate on each state before a filibuster is overcome.

9. The rationale for the VP taking this position would be that the Electoral Count Act, enacted more than 130 years ago by the 50th Congress, cannot constitutionally bind the current Senate. There is strong scholarly consensus on this point, including a 2001 article in the Harvard Law Review by Prof. Laurence Tribe on Bush v. Gore.

10. There is one key problem with executing this strategy. Perhaps mindful of the principle that a past Congress can't bind the current Congress, **the House and the Senate have a practice of adopting, before the Jan. 6 count, by concurrent resolution, the terms of the Act**, which is routinely adopted by unanimous consent. See pages S6-S7 of the Jan. 3, 2017, Congressional Record, [here](#).

11. Presumably the same Concurrent Resolution will be presented for approval this January 3. If it is not blocked, then the current Senate will have modified the normal filibuster rules to adopt the 2-hour limit on debate for each state's contested electoral votes. There would no longer be a constitutional problem with the 2-hour limit. In that event, it would appear the VP could not permit a filibuster on the vote of any state.

12. Fortunately, there is a solution. A senator, for example, Senator Hawley, could on January 3 object to Concurrent Resolution. Once recognized, he could give a lengthy speech, perhaps lasting hours, explaining why the Senate should not limit debate to 2 hours on objections to particular states, given the large amount of evidence of serious illegalities in the vote in various states. This would provide a forum for exposing some of the flaws in the election to public attention. In other words, the Senator would filibuster the Concurrent Resolution in order to prevent it from being adopted, so as to permit later filibusters regarding individual states. The Concurrent Resolution could only be adopted if the Biden camp won a cloture vote to cut off debate on the Concurrent Resolution, which again would take about a dozen defecting Republican senators.

13. One advantage of this strategy is that we could know before Jan. 6 whether filibusters of individual states are viable. If the Concurrent Resolution can be blocked, then the VP would know that he could permit the count to go forward under the Act, knowing that doing so would not allow the Biden camp to easily rush through the electoral returns and claim victory. Biden could only win if he could fight his way through filibusters on multiple states, during which time the public would grow increasingly aware of the illegalities which plagues this election, and the pressure on the Supreme Court and state legislatures to act would grow. This strategy could offer a serious chance of success, or at least of showing the illegitimacy of Biden's election, without requiring controversial action by the VP.

14. The two approaches are not necessarily incompatible. The VP could, before allowing a break for the houses to debate Arizona, say that he is not conceding that the 2 houses of Congress have any role in actually counting the electoral votes, but that he recommends a debate because a debate is useful, regardless of who ultimately is responsible for the counting of votes. Perhaps he could let all 7 states be filibustered and voted on by the 2 houses before addressing whether he, or instead the 2 houses, are responsible for counting the votes. If he and Trump ended up winning through the filibuster strategy (e.g., to resolve the continuing delay, the Supreme Court and/or state legislatures act to award Trump & Pence enough electoral votes to win), the VP could avoid ever having to claim the authority to count the votes.

END

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